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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JAMES MICHAEL BRADY, Defendant and Appellant.	G052220 (Super. Ct. No. 06HF0623) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Derek Guy Johnson, Judge. Affirmed.

William G. Holzer, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Theodore M. Cropley and Warren J. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant James Michael Brady appeals from the court's denial of his petition for recall of his sentence and resentencing under Penal Code section 1170.126 (enacted by Proposition 36).[1] Defendant contends the court abused its discretion by finding his release would pose an unreasonable risk of danger to public safety. He further claims the court implicitly placed the burden on him to prove his rehabilitation. Finally, he argues section 1170.18's definition of "unreasonable risk of danger to public safety" applies to section 1170.126. We disagree with defendant's contentions. Accordingly, we affirm the court's order denying his petition.[2]

FACTS

We take some of the facts from our prior unpublished opinion (*People v. Brady* (Sept. 18, 2009, G040707) (*Brady I*)), which is included in the record.[3]

"Beginning no later than the year 2000, Melinda Lamb was romantically involved with defendant, although she remained married to another man in a marriage of convenience. At trial Lamb testified about defendant's many acts of domestic violence against her over the course of their relationship." (*Brady I*, *supra*, G040707.)

"*Charged Offenses*"

"Count 3 of the operative information charged defendant with committing domestic violence battery upon Lamb on February 27, 2006. On that date Lamb was working at her job at a school district while defendant slept in Lamb's van parked at the

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1 All statutory references are to the Penal Code.

2 The court's denial of defendant's section 1170.126 petition is an appealable order. (*Teal v. Superior Court* (2014) 60 Cal.4th 595, 598.)

3 The appellate opinion is part of the record of conviction, and may be considered by a court in making factual determinations about the respective prior conviction. (*People v. Hicks* (2014) 231 Cal.App.4th 275, 286.)

site. Later, as Lamb drove home with defendant in the back of the van, defendant took Lamb's cell phone and began looking at her recent calls. Several times Lamb asked him to return her phone because she 'really needed to use' it. Defendant threw the phone at Lamb's face, breaking a crown on her front tooth.

"Count 2 charged defendant with committing domestic violence battery upon Lamb on March 13, 2006. On this occasion, Lamb was driving home from work with defendant seated in the front passenger seat. Defendant could not find his sunglasses so he 'ripped' Lamb's sunglasses off her face 'as hard as he could,' scratching her face, particularly her nose.

"Count 1 charged defendant with committing aggravated assault upon Lamb on March 17, 2006. On that date, Lamb spent several hours at the dentist's office getting her broken tooth capped while defendant waited in the van. When Lamb returned to the van, defendant was angry she had taken so long and accused her of having an affair with the dentist or 'a neighbor of the dentist.'

"On the way home, they stopped at a bird sanctuary where defendant threw a shoe at her. Back in the van, defendant was unhappy about Lamb smoking 'the last' cigarette. He took the lit cigarette from her, 'held the burning end close to [her] cheek so [she] could hear [it] sizzle,' and threatened to burn her. He then 'threw her to the back of the van.'

"Later, when defendant and Lamb walked into Lamb's house after running an errand, they started arguing. At this point, it was light outside. Defendant 'became agitated and chased [Lamb] around inside the garage and told [her] to shut [her] filthy mouth.' Crying, Lamb tried 'to get to the door,' but he would not let her leave. He screamed at her 'to shut up'; 'held his hand over [her] mouth'; and yelled many times, 'Shut up, bitch.' Lamb was afraid 'he would snap [her] neck' as he had threatened to do 'on rare occasions' in the past. He 'threw [her] down to the ground and yelled at [her],

and if [she] got up he chased [her].' He then hit her 'really hard' with a closed fist twice on the back of her head.

"Frightened and in pain, Lamb 'got really small' into a fetal position and 'put a pillow over [her] head' because she 'didn't want him to hit [her] anymore.' She lay 'still to calm him down.'

"Lamb told defendant she was in pain and that she wanted to go to a doctor. He laughed and said, 'That's one place you're not going.' Lamb said she would 'make up a story' and tell the doctor she 'fell down,' but defendant still refused to let her see a doctor.

"Lamb did not phone the police at this point '[b]ecause it would have pissed him off.' 'He came at [her] again,' 'grabbed [her] face,' and 'threw [her] down.' Lamb 'blacked out.'

"When she awoke, it was dark outside and defendant was shaking her. 'He wanted something to eat.' She asked to leave several times, but he said, 'No.' She made him peaches and cream.

"While they were both in the kitchen, Lamb heard her husband unlocking and opening the front door. Defendant ran into the garage. Lamb went out the front door, ran to her van in the driveway, and got into the driver's seat. Defendant got into Lamb's van. Lamb moved to her husband's van parked next to hers, and locked the door. Defendant banged on the van's window, told her to let him in because Lamb's husband would phone the police, tried to break the window with a rock, and then 'fled down the driveway.'

"Lamb's husband phoned 911. An officer arrived at the scene to find Lamb and her husband standing in the driveway. Lamb 'appeared nervous and afraid' and said she feared defendant would 'come back for her.' She kept looking around, as though for somebody, and at a fence near her house, afraid defendant would climb over it.

"Lamb had cuts 'above her lip and to the side of her nose.' She stated defendant caused those injuries and that her head hurt and was throbbing. When the officer offered to call the paramedics, Lamb stated she 'did not need them at that point,' but would be going to the doctor herself.

"In addition to interviewing Lamb at the scene, the officer took a written statement from her at the police station. Lamb still complained of pain and said she was afraid she would black out. She declined medical attention again and said she would 'get it on her own.' In the early morning hours of the next day, an 'emergency room physician diagnosed Lamb with a concussion.'" (*Brady I*, *supra*, G040707.)

"*Uncharged Conduct*"

"In 2001, Lamb moved into an apartment with defendant. During the time they lived together, defendant physically assaulted Lamb at least 12 times, but Lamb did not report most of these incidents to the police. She reported only the assaults where she feared defendant 'was going to actually be out of control enough to kill' her. In April 2001, Lamb locked defendant out of the apartment. He entered by smashing the bedroom window and took the keys to a rental truck. Lamb fled and hid in a parking lot where, fearful for her life, she contacted security. A police officer arrived at the scene in response to a neighbor's phone call. Lamb told the officer she was afraid of defendant and asked for a protective order.

"Defendant served a prison term for the April 2001 offense. Lamb visited him in prison twice a month or more because she loved him, although she moved back in with her husband for financial reasons. Upon defendant's release from prison, Lamb resumed her relationship with him.

"In May 2005, a second incident sent defendant to prison. In this incident, defendant came to Lamb's house, angry because Lamb was 'cleaning and doing laundry.' Defendant threatened to burn the house and to break Lamb's husband's neck and legs so

Lamb 'would have to take care of [her husband for] the rest of [her] life.' Defendant 'picked [Lamb] up by [the] face and threw [her] onto the cement floor.'

"Based on this incident, Lamb obtained a protective order prohibiting defendant from coming within one mile of her or contacting her. Despite the protective order, Lamb visited him in prison at least once and also stayed in touch through letters and phone calls.

"Upon defendant's release from prison on January 17, 2006, Lamb picked him up and drove him to his new home. Based on his letters and phone calls, she believed he had changed. She had daily contact with him, and let him stay at her house when her husband was away. During the next six weeks, defendant physically abused Lamb at least five times. In one incident, defendant and Lamb were at a pharmacy, when Lamb saw a male friend and spoke briefly with him. Defendant and Lamb went out to her van, where defendant called her a 'whore' and threw her 'across from the front to the back' of the vehicle. (During their relationship, defendant called her 'fucking cunt bitch whore' so often, 'it was like [her] second name.')

"Between February 27, 2006 (the date of the count 3 battery) and March 13, 2006 (the date of the count 2 battery), defendant's anger escalated; he was hurtful to and hit Lamb more often. She did not report it to the police in hopes defendant could change.

"On March 14, 2006, defendant knocked loudly on Lamb's door and 'scream[ed] and holler[ed]' until she let him in to take a shower. Lamb tried to leave the house, but defendant 'came out after' her and 'told [her] to get back in the house.'

"Three days later, the count 1 aggravated assault incident occurred.

"One week later, defendant went to Lamb's work place in his car and demanded that she follow him in her van. As soon as they neared a 'freeway on-ramp [Lamb] bolted on the freeway and he tried to run [her] off the road.' He drove away when Lamb began following a police car. That same day, when Lamb and her husband

were not home, a friend of Lamb's husband phoned to warn Lamb that defendant was trying to break into the house.

"The next day, Lamb was home alone and let defendant into the house to use the shower. Defendant asked Lamb to drive him to his friend's house. En route, Lamb stopped at an intersection near a police station and walked down the center divider. She planned to walk to the police station, because she had decided to get defendant 'away from [her] forever' because he was involving her job, which she loved and was 'the only thing [she] had left' and she did not 'want to lose it.' Defendant shouted at her. The police arrived and arrested defendant." (*Brady I*, *supra*, G040707.)

Defendant was charged with assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)), violating a protective order (§ 166, subd. (c)(1)), and two counts of misdemeanor domestic violence battery (§ 243, subd. (e)(1)). The jury found defendant guilty on all four counts. The trial court "sentenced defendant to state prison for 25 years to life on the aggravated assault count and stayed sentence on the other counts." (*Brady I*, *supra*, G040707.)[4]

On November 22, 2013, defendant petitioned for recall of his sentence and resentencing under section 1170.126. The judge who imposed defendant's sentence conducted the section 1170.126 hearing. The court determined that resentencing defendant would pose an unreasonable risk of danger to public safety. It therefore denied his petition. We recite the facts concerning defendant's section 1170.126 petition in more detail later in this opinion.

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[4] In *Brady I*, this court reversed defendant's conviction for violating a protective order.

DISCUSSION

The Three Strikes Reform Act of 2012

"On November 6, 2012, the voters approved Proposition 36, the Three Strikes Reform Act of 2012, which amended sections 667 and 1170.12 and added section 1170.126 . . . ." (*People v. Yearwood* (2013) 213 Cal.App.4th 161, 167.) Under the former "three strikes" law, a defendant convicted of two prior serious or violent felonies[5] was "subject to a sentence of 25 years to life upon conviction of a third felony," even if the third felony was nonserious and nonviolent. (*People v. Superior Court* (*Kaulick*) (2013) 215 Cal.App.4th 1279, 1285 (*Kaulick*).) Under Proposition 36 (the Act), if the third felony is nonserious and nonviolent, the defendant will be sentenced as a "second-strike" offender under section 667, subdivision (e)(1). (*Kaulick*, at p. 1286.)

By enacting section 1170.126, the Act established a resentencing procedure for inmates serving a "third strike" sentence for nonserious, nonviolent felony convictions. Such an inmate may petition the trial court for a recall of sentence and resentencing within the statutorily mandated time period. (§ 1170.126, subd. (b).) If the court determines the defendant is eligible for resentencing under section 1170.126, subdivision (e), the defendant will be resentenced as a "second striker" "unless the court, in its discretion, determines that resentencing the petitioner would pose an unreasonable risk of danger to public safety." (*Id*., subd. (f).) In determining whether resentencing the defendant would pose an unreasonable risk of danger, the court may consider "(1) [t]he petitioner's criminal conviction history, including the types of crimes committed, the extent of injury to victims, the length of prior prison commitments, and the remoteness of the crimes; [¶] (2) [t]he petitioner's disciplinary record and record of rehabilitation

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[5] References in this opinion to serious or violent felonies refer to offenses listed in sections 1192.7, subdivision (c) and 667.5, subdivision (c), respectively. References to nonserious or nonviolent felonies refer to felonies not so listed.

while incarcerated; and [¶] (3) [a]ny other evidence the court, within its discretion, determines to be relevant in deciding whether a new sentence would result in an unreasonable risk of danger to public safety." (*Id.*, subd. (g).)

Two-prong Standard of Review

We apply a two-step standard of review to a court's denial of a defendant's section 1170.126 petition. First, we review for substantial evidentiary support the *facts* underlying the court's determination that resentencing the defendant would pose an unreasonable risk of danger to public safety. (*People v. Buford* (2016) 4 Cal.App.5th 886, 901 (*Buford*).) Second, we review for an abuse of discretion the court's determination (based on those facts) that the defendant's resentencing would pose such a risk of danger. (*Ibid*.)

As to the first prong, the People bear the burden of proving the *facts* upon which the trial court based its determination of dangerousness. (*Buford, supra*, 4 Cal.App.5th at p. 901.) On appeal, we review the court's factual findings to determine whether they are supported by substantial evidence. Substantial evidence is evidence that is "of ponderable legal significance"; it "must be reasonable in nature, credible, and of solid value . . . ." (*DiMartino v. City of Orinda* (2000) 80 Cal.App.4th 329, 336.) An appellate court "must accept any reasonable interpretation of the evidence which supports the trial court's decision." (*Ibid*.)

As to the second prong, "[t]he ultimate decision — whether resentencing an inmate would pose an unreasonable risk of danger to public safety — . . . lies within the sound discretion of the trial court." (*Buford, supra*, 4 Cal.App.5th at p. 893.) If the prosecution meets its burden of establishing *facts* that would support a finding of dangerousness, the court has broad discretion in making the dangerousness determination. Therefore, the court's ruling on dangerousness is reviewed for abuse of

discretion, and that ruling will be upheld if it does not "exceed[] the bounds of reason, all of the circumstances being considered." (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

Defendant's Resentencing Petition, the People's Opposition, and Defendant's Reply

Defendant filed his petition on November 22, 2013. He asked the court to take judicial notice of the court file in the case.

Prior to the hearing on defendant's petition, the People submitted written opposition. The People also subpoenaed defendant's prison records and had them sent to the court. In its opposition, the prosecution acknowledged its burden to show, by a preponderance of the evidence, that defendant's resentencing would pose an unreasonable risk of danger to public safety. To meet this burden, the People's opposition, inter alia, described defendant's lengthy criminal record, his misconduct in prison, and the details of the life crime.[6]

As to defendant's criminal history, the People's opposition chronicled his 16 convictions of various crimes during the 20-year period beginning in 1988. Between 1988 and 1995, defendant was convicted of giving false information to a police officer, petty theft, assault (twice), battery, grand theft of a vehicle or vessel (twice), misdemeanor domestic violence (twice), vandalism, trespass, disobeying a court order (twice), being under the influence of a controlled substance, and possessing a dangerous drug without a prescription. Thereafter, in 1996, he was placed on 60 months of probation after he pleaded guilty to vehicle theft, stalking, burglary, stalking in violation of a temporary restraining order, and aggravated assault with force likely to cause great bodily injury. Then, around 10 months later, he was convicted of felony stalking in

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[6] The life crime refers to the crime for which defendant was convicted and received an indeterminate life sentence (i.e., the "third strike"). Defendant's life crime was aggravated assault. The details of his life crime are recounted in the "Facts" portion of this opinion.

violation of a temporary restraining order and sentenced to four years in prison. After his release from prison, he violated his parole conditions. In 2001, he was convicted of making criminal threats and false imprisonment, and sentenced to 32 months in prison. In 2003, he was convicted of possessing a controlled substance and sentenced to 3 years in prison. In 2005, he was convicted of making criminal threats and sentenced to 16 months in prison. In 2006, he violated his parole by being arrested for violating a domestic violence protective order. In 2008, at age 41, he was convicted of the life crime and sentenced to 25 years to life in prison. At the sentencing hearing on the life crime, the court noted that defendant had "gotten nothing but breaks along the way."

The People's opposition also recited defendant's prison infractions: On February 27, 2012, he got into a fight with an inmate, and on October 6, 2013, he failed to leave his bunk for mandatory inmate count. (Although not included in the opposition, defendant had another major infraction, occurring in November 2005, for verbally threatening a staff member.) He also violated other prison rules.

Attached to the People's opposition were several exhibits, including the personality assessment screener and Carlson psychological survey that Dr. Melvin Macomber (defendant's expert witness) administered to defendant.

In defendant's written reply to the People's opposition, he argued that resentencing him would not pose an unreasonable risk of danger to public safety. He acknowledged the wrongfulness of his conduct and stated that he accepted full responsibility for his actions.

Defendant subsequently submitted various certificates from recovery programs, Macomber's risk assessment, a relapse prevention plan, and letters of support from a correctional officer, a nurse, and a rehabilitation counselor. Most of these documents reflect efforts commenced by defendant after the passage of Proposition 36 on November 6, 2012. Prior to Proposition 36's passage, defendant had attended Alcoholics

Anonymous in the first two quarters of 2011 and had completed around seven months of anger management classes (with the ninth month being completed on February 11, 2013).

The Resentencing Hearing

The hearing on defendant's resentencing petition took place over two days and consisted of the testimony of one witness. At the outset of the hearing, the court said to both counsel, "I'll do whatever you fellas wanna do." Defense counsel immediately stated he had one witness (an expert witness) and that he (defense counsel) hoped to complete his direct examination of the witness that day.

Defense counsel then called Macomber to the stand, who testified on direct examination that he is a forensic psychologist. He personally evaluated defendant and defendant's Department of Corrections file. Based on his evaluations of defendant, Macomber concluded that defendant had genuinely accepted responsibility for his actions, that defendant was at a low risk of engaging in future violent behavior, and that if released defendant would not pose an unreasonable risk of danger to society. Defendant had two disciplinary infractions in the eight to nine years defendant had been incarcerated, one for being asleep during inmate counting and the other for fighting with his cell mate.[7] Macomber opined that having two major disciplinary infractions in eight to nine years was unusual for an inmate serving an indeterminate life sentence because such an inmate would normally have accumulated multiple major disciplinary infractions in that amount of time.

[7] As previously mentioned, defendant had another major infraction, occurring in November 2005, for verbally threatening a staff member.

On cross-examination, Macomber testified that he had not checked the police reports describing the details of the life crime, nor had he verified with the victim any of defendant's self-reported information. Most of defendant's rehabilitation efforts occurred after the passage of Proposition 36. Macomber had made no attempts to verify or correct defendant's self-reported information on the psychological examinations and risk of violence assessments.[8] Macomber had also made mistakes in processing some of defendant's scores on a personality assessment test.[9]

Later during the cross-examination, Macomber testified about the life crime. When defendant spoke with Macomber about the life crime, defendant said that "the victim was hiding from her husband and [that defendant] tried to keep her quiet by tapping her on the head to get her attention, to tell her to be quiet." Defendant also denied to Macomber that he had beaten the victim. Macomber admitted that if defendant's assertions were inaccurate, this showed that defendant was not accepting responsibility for his actions, was minimizing his crime, and lacked insight into it.

After the completion of Macomber's testimony, the prosecutor advised the court that the People had no witnesses.

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[8] For example, the Carlson psychological survey had a question concerning prior drug use. Macomber conceded that defendant's answer to this question was probably incorrect because Macomber was aware that defendant had a history of several years of drug abuse, and yet defendant had answered that he had used drugs "once or twice."

[9] When the prosecutor pointed out an error in Macomber's scoring of the personality assessment screener, Macomber admitted he had made a mistake. Macomber later admitted to having made a second mistake on this same exam, stating, "Oh, no." "I goofed again."

The court, in announcing its ruling, stated that the psychological "tests are flawed [because] there is too much room for insincerity." Furthermore, the court was "particularly struck by the fact that [defendant] denied that he acted violently towards Ms. Lamb during the course of that life crime." The court remembered "the testimony vividly that [defendant] slammed Ms. Lamb down on the ground, in the garage, on the concrete floor. Ms. Lamb lost consciousness and came to because [defendant] was shaking her, demanding that [she] fix [him] dinner." The court found defendant lacked remorse and "remains a danger to society." Accordingly, it denied his resentencing petition.

Prong 1 of the Standard of Review: Substantial evidence supports the court's implied factual findings. The prosecution met its burden of proof, and the court did not *implicitly place the burden on defendant.*

Defendant asserts the court implicitly placed the burden on him to prove he was rehabilitated. To support his assertion he points out that, at the hearing, the defense case was presented first and the People did not present any witnesses. He also complains that the prosecutor posed the following query during closing argument: "[Defendant] was absolutely a danger to society [at the time of the life crime]. [¶] So, what has changed? What evidence is there that that is no longer the case?" Defendant asserts the prosecutor's query implied that the defense bore the burden to prove defendant's rehabilitation. Defendant concludes that the court's failure to correct the prosecutor, or to indicate that the People bore the burden, shows the court improperly placed the burden on him.

But, unless defendant proves otherwise, we must presume the court was aware of the People's burden to prove facts sufficient to support the court's determination of dangerousness. (*People v. Mack* (1986) 178 Cal.App.3d 1026, 1032 [absent contrary evidence, reviewing court presumes trial court knew and applied correct law in performing official duties].)

Defendant has failed to rebut this presumption. Neither of his arguments has merit. First, the court's failure to correct the prosecutor proves nothing. The court itself was the fact finder; therefore, a judicial admonition to the fact finder was unnecessary. Moreover, the prosecutor's query constituted a small snippet of his closing argument that covered five and one-half pages of the reporter's transcript. The challenged query cannot fairly be interpreted as a suggestion that defendant bore the burden of proof.

Second, although the resentencing hearing commenced with the defense expert's testimony, the prosecution had already met its burden by submitting evidence of the details of defendant's extensive criminal history, his incarceration record, and his life crime. This substantial evidence supports the court's implied factual findings underlying its denial of defendant's resentencing petition.

At the hearing, the court told both attorneys they could proceed however they wanted. Defense counsel logically went first, as his expert witness was the only witness to be called at the hearing.

Thus, this is not a case like *People v. Esparza* (2015) 242 Cal.App.4th 726 (*Esparza*), where the court at the resentencing hearing immediately *instructed* defense counsel to present his evidence. (*Id*. at p. 741.) Furthermore, in *Esparza*, the court based its determination of dangerousness in part on its *inaccurate* finding that the defendant had only started Alcoholics Anonymous classes in April 2013, when in fact the defendant had started attending in the second quarter of 2012." (*Id.* at p. 744.) The appellate court concluded that the trial court's analysis had been "disconnected from the evidence presented." (*Ibid.*) Thus, whether the error was viewed as a failure of the prosecution to carry its burden of proof or as an abuse of discretion by the trial court, the defendant was entitled to a new hearing. (*Id.* at pp. 744-745.)

Accordingly, we reject defendant's argument that the court implicitly imposed the burden of proof on him.

Prong 2 of the Standard of Review: The court did not abuse its discretion by finding defendant's release would pose an unreasonable risk of danger to public safety.

Defendant contends the court's finding of dangerousness was an abuse of discretion. He argues the court denied his petition because he (defendant) minimized his violent assault on Lamb. Relying on *Esparza*, *supra*, 242 Cal.App.4th 726, he argues that the law governing parole hearings should also apply to section 1170.126 hearings. Specifically, he asserts that a parole review board cannot use an inmate's claim of innocence as the basis for denying his or her release on parole.

The Attorney General counters that the court did not abuse its discretion because the court properly considered defendant's criminal history, incarceration record, and other relevant evidence. The Attorney General argues that defendant's criminal history demonstrates he is unable to control himself when not incarcerated and thus would present a danger to public safety. The Attorney General argues the court was rightly concerned with defendant's minimization of the events of the life crime, and that, even after accounting for the mitigating factors that defendant presented, the court did not act arbitrarily or capriciously when it found that the prosecution's evidence outweighed defendant's mitigating evidence.

We agree the court did not abuse its discretion by determining that resentencing defendant would unreasonably risk endangering the public. Even while in prison — where women were not present — defendant sometimes acted defiantly and violently. Outside of prison, he unleashed his controlling, abusive behavior against women with whom he was in a relationship. The dangerousness of his behavior against vulnerable women was compounded by his abuse of controlled substances.

Defendant's countervailing arguments do not change our conclusion that the court properly exercised its discretion in finding defendant's release presented an unreasonable risk of danger. On appeal, we do not reweigh the evidence supporting dangerousness against the evidence showing rehabilitation. (*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067 [when reviewing for abuse of discretion, appellate court resolves evidentiary conflicts in light most favorable to trial court's ruling].) A court "may properly deny resentencing under the Act based solely on immutable facts such as a petitioner's criminal history" if the immutable facts support the court's ultimate conclusion that the defendant continues to pose an unreasonable risk of danger to public safety. (*Esparza, supra,* 242 Cal.App.4th at p. 746.) In any event, the court's decision was based on more than the immutable facts. The court found the psychological tests upon which defendant relied were flawed, that defendant denied acting violently toward Lamb, that defendant minimized the events of the life crime, and that defendant lacked remorse for his actions. Defendant's reliance on *Esparza*, to support his contention that parole hearing standards are instructive for section 1170.126 determinations, is misplaced. *Esparza* explicitly declined "to decide how and to what extent parole cases inform the decision whether to resentence a petitioner under the Act or [an appellate court's review] of such a decision." (*Esparza*, at p. 746.)

For the above reasons, we conclude the court did not abuse its discretion by denying defendant's resentencing petition.

Section 1170.18's Definition of an "Unreasonable Risk of Danger to Public Safety" Does Not Apply to Resentencing Under the Act

Section 1170.18 governs the procedures for resentencing felons as misdemeanants under Proposition 47. Subdivision (c) of section 1170.18 provides: "As used throughout this Code, 'unreasonable risk of danger to public safety' means an unreasonable risk that the petitioner will commit a new violent felony within the meaning

of" section 667, subdivision (e)(2)(C)(iv). Defendant argues the phrase "this Code" refers to the Penal Code. He concludes that, under section 1170.18's plain language, the definition of "unreasonable risk of danger to public safety" applies to all Penal Code statutes containing that same phrase, including section 1170.126.

The Attorney General counters that section 1170.18, subdivision (a), implicitly defines "petitioner" as an individual petitioning for resentencing under section 1170.18. Thus, when section 1170.18, subdivision (c), states that "[a]s used throughout this Code, 'unreasonable risk of danger to public safety' means an unreasonable risk that the *petitioner* will commit a new violent felony" (italics added), the statute is really saying that the definition of "unreasonable risk of danger to public safety" (*id*., subd. (b)) applies only to an individual who is petitioning for resentencing under section 1170.18.

Whether section 1170.18's definition of an "unreasonable risk of danger to public safety" applies to section 1170.126 is a question of law; thus we review the issue de novo. This issue is currently pending before the California Supreme Court. (*People v. Chaney* (2014) 231 Cal.App.4th 1391, review granted Feb. 18, 2015, S223676.)[10]

"'In interpreting a voter initiative . . . we apply the same principles that govern statutory construction. [Citation.] Thus, "we turn first to the language of the statute, giving the words their ordinary meaning."'" (*People v. Briceno* (2004) 34 Cal.4th 451, 459.) We do not rewrite unambiguous language. (*People v. Skinner* (1985) 39 Cal.3d 765, 775.) But, "when it appears clear that a word has been erroneously used" (*ibid*.), we must "'ascertain and effectuate the intent of the voters who passed the initiative measure.'" (*Briceno*, at p. 459). Indicia of the voters' intent include "'"the analyses and arguments contained in the official ballot pamphlet."'" (*Ibid.*) "The

[10] Under California Rules of Court, rule 8.1115(e)(1), a published opinion of a Court of Appeal on which Supreme Court review is pending "may be cited for potentially persuasive value only."

statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme [in light of the electorate's intent]." (*Ibid.*)

Under its plain language, section 1170.18 refers to one kind of petition only — i.e., a petition filed under section 1170.18, subdivision (a). (*People v. Guzman* (2015) 235 Cal.App.4th 847, 855, review granted June 17, 2015, S226410.) Under section 1170.18, subdivision (a), a "person who, on November 5, 2014, was serving a sentence for a conviction . . . of a felony or felonies who would have been guilty of a misdemeanor under [Proposition 47, i.e., the Safe Neighborhoods and Schools Act] ('this act') had this act been in effect at the time of the offense may petition for a recall of sentence . . . to request resentencing in accordance [with statutes] amended or added by this act." Nothing in section 1170.18, subdivision (a) suggests "this act" encompasses section 1170.126 or any other statute not amended or added by Proposition 47. Consequently, whenever section 1170.18 refers to the "petitioner," the statute is referring to a person who has filed a petition under section 1170.18, subdivision (a). Thus, the plain words of section 1170.18 indicate that the definition of "unreasonable risk of danger to public safety" applies only to a "petitioner," defined as an individual filing a petition under section 1170.18, subdivision (a). (*Guzman*, at p. 855.)

Section 1170.18, subdivision (n), also provides that "[n]othing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act." If we were to apply the narrowed definition of "risk of danger" contained in section 1170.18, subdivision (c), to section 1170.126, we would necessarily be "diminish[ing] or abrogat[ing] the finality of judgments" in cases subject to section 1170.126. (*People v. Myers* (2016) 245 Cal.App.4th 794, 804-805, review granted May 25, 2016, S233937.) Section 1170.18, subdivision (c), defines an unreasonable risk of danger to public safety as the risk that a petitioner will commit one

of the aggravated offenses in section 667, subdivision (e)(2)(C)(iv).[11] Thus, at a section 1170.18 resentencing hearing, a court may deny resentencing to an eligible petitioner only "if it finds 'an unreasonable risk' that [a petitioner] will commit one of those egregious offenses." (*People v. Davis* (2015) 234 Cal.App.4th 1001, 1022, review granted June 10, 2015, S225603.) This narrow definition is a significant shift from the broad analysis under section 1170.126, where the court can deny a defendant's petition if it finds that resentencing would pose an unreasonable risk of danger to public safety under any relevant factor set out in section 1170.126, subdivision (g).

We conclude that section 1170.18's narrow definition of "unreasonable risk of danger to public safety" does *not* apply to resentencing petitions under section 1170.126.

This conclusion is supported by the official ballot pamphlets for Propositions 36 and 47. The text of Proposition 47 explicitly conveyed that "a court is not required to resentence an offender currently serving a felony sentence if the court finds it likely that the offender will commit a specified severe crime." (Voter Information Guide, Gen. Elec. (Nov. 4, 2014) analysis by the Legis. Analyst, p. 36.) Those specified severe crimes are the ones found under section 667, subdivision (e)(2)(C)(iv).

No such specificity is found in the official ballot pamphlets on the Act, i.e., Proposition 36. The text of Proposition 36 states generally that a court is required to resentence eligible petitioners unless the court "determines that resentencing the [petitioner] would pose an unreasonable risk to public safety." (Voter Information Guide,

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[11] Those offenses include sexually violent offenses, sexual offenses that involve a child under 14 years of age, homicide or attempted homicide, "[s]olicitation to commit murder . . . ," "[a]ssault with a machine gun on a peace officer or firefighter," "[p]ossession of a weapon of mass destruction," and a violent or serious felony offense that is punishable in California by life imprisonment or death. (§ 667, subd. (e)(2)(C)(iv)(V)-(VIII).)

Gen. Elec. (Nov. 6, 2012) analysis by the Legis. Analyst, p. 50.) The text of the Act then explains that a court is to use certain factors, now enumerated in section 1170.126, subdivision (g), in determining whether resentencing a petitioner would indeed pose an unreasonable risk of danger to public safety. (Voter guide, *supra*, analysis by the Legis. Analyst, p. 50.)

Our conclusion is also supported by the notable differences between the populations of felons eligible for resentencing under each proposition. (*Guzman*, *supra*, 235 Cal.App.4th at p. 855.) In the context of the Act, an eligible petitioner will necessarily be a felon who has committed two serious and/or violent crimes. These third strikers are a "riskier and more volatile group of felons than the group of felons to which Proposition 47 applies." (*Guzman*, at p. 855.) In contrast, under Proposition 47, eligible petitioners are convicted felons serving sentences for specific drug and/or theft related offenses, previously classified as felonies or "wobblers" but now as misdemeanors. (*Guzman*, at p. 855.) Different standards for "dangerousness" are therefore sensible. In a section 1170.126 hearing, the court is dealing with an individual who is potentially more dangerous than an individual eligible for resentencing under section 1170.18. Giving the judge broader discretion in section 1170.126 hearings is reasonable because of the higher risk of releasing a potentially dangerous defendant (whose dangerousness is evidenced by his or her prior violent and/or serious felonies).

Aside from section 1170.18, subdivision (c), "nothing in Proposition 47 suggests an even indirect application of any of its provisions to Proposition 36." (*Guzman*, *supra*, 235 Cal.App.4th at p. 855.) The phrase "'"[a]s used throughout this Code"'" in section 1170.18, subdivision (c), was not meant to "'hamstring the Three Strikes Reform Act.'" (*People v. Sledge* (2015) 235 Cal.App.4th 1191, 1212, review granted July 8, 2015, S226449.)

Thus, we conclude that section 1170.18, subdivision (c)'s definition of "unreasonable risk of danger to public safety" does not apply to section 1170.126.

DISPOSITION

The court's postjudgment order is affirmed.

IKOLA, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.